Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	PP Docket No. 93-253
of the Communications Act	)	
Competitive Bidding	)	

To: The Commission

REPLY COMMENTS OF COLUMBIA CELLULAR CORPORATION

Thomas Gutierrez, Esq.
Davis A. LaFuria, Esq.
Lukas, McGowan, Nace & Gutierrez
1819 H. Street, N.W., 7th Floor
Washington, D.C. 20006

November 30, 1993

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REPLY COMMENTS

Columbia Cellular Corporation ("Columbia"), by its attorneys and pursuant to Section 1.415 of the Commission's rules, hereby submits Reply Comments in the captioned proceeding.[1/] Columbia provides consulting services to numerous communications service providers in various wireless industries. Columbia is also an applicant in the 220 MHz nationwide service. Accordingly, Columbia is an interested party to this proceeding.

I. Introduction

Approximately 180 parties filed comments in the captioned proceeding. Rather than attempt to treat exhaustively the multitude of issues raised by the commenting parties, Columbia will address only a few issues of importance in this proceeding.

1/ *Notice of Proposed Rulemaking*, PP Docket No. 93-253, 58 Fed. Reg. 53489 (October 15, 1993) ("*Notice*"). In the *Notice*, the Commission requested that comments be filed on or before November 10, 1993, and that reply comments be filed on or before November 24, 1993. Subsequently, the Commission extended the date for filing of reply comments to November 30, 1993. *See Order* in PP Docket No. 93-253, DA 93-1426, released November 23, 1993. Accordingly, these Reply Comments are timely filed.

Columbia supports the majority view that auctions should not be used for pending RSA applications. Columbia also believes that preferences should be made for all spectrum that is auctioned, rather than through the proposed "set-aside" mechanism. Finally, Columbia supports the proposal to permit winning bidders to pay "over time" to permit the widest possible pool of applicants to participate in the auction process.

II. Auctions Should Not Be Used For Pending RSA Applications.

At least two dozen of those parties addressed the issue of whether the Commission should auction currently pending cellular applications. Columbia agrees with the vast majority of the commenting parties that auctions should not be used to license pending RSA applications.[2/] The legislative history of the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act") and applicable case law support the conclusion that applications filed before July 26, 1993 should be processed under existing rules. For example, *John Andrikopoulous, et al.*, properly note that a Senate amendment to the budget legislation expressly stated that auctions should apply to licenses for new spectrum and should not alter existing spectrum allocation procedures.[3/]

2/ *See, e.g.*, comments filed by *The Small RSA Operators, Wendy C. Coleman D/B/A WCC Cellular, JPM Telecom Systems, Inc., Sprint Corporation.*

3/ *See* 139 Cong. Rec. S7986, S7995 (daily ed. June 24, 1993).

Columbia agrees with these other commenters in their belief that the retroactive application of auctions would be impermissible. As of this date, the Commission has not set forth the required analysis under *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) and its progeny[4/] to balance the ill effects of retroactive application against potential public interest considerations to be considered. As demonstrated at length by *WCC Cellular*, when the various factors in the balancing equation are carefully analyzed, one must conclude that applications on file before July 26, 1993 must be processed under the rules in existence at the time they filed their applications. Moreover, if the Commission's goal is rapid implementation of services to the public, there is no question but that holding a lottery immediately and rapidly processing the winning applications is far superior to starting the application process anew.

III. **Preferences Should Be Established Throughout The PCS Service.**

The Commission has proposed to set aside one 20 MHz block and one 10 MHz block of Personal Communications Service ("PCS") spectrum as "preference" spectrum, to be awarded only to minority or small business applicants, the definition of which entities has not yet been crystallized. Rather than adopt this approach,

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4/ *See Retail, Wholesale, and Dep't. Store Union v. NLRB*, 446 F.2d 380, 389-90 (D.C. Cir. 1972); *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1554-5 (D.C. Cir. 1987).

Columbia believes preferences should be awarded for all spectrum that is auctioned.[5/]

Under the current proposal, the Commission presupposes that small business or minority-controlled entities will not have the financial wherewithal to compete for Major Trading Area ("MTA") licenses. In fact, such a presupposition unfairly discriminates against such entities and limits their ability to compete at higher levels. For example, a minority-controlled entity bidding for an MTA license is outbid by a slim margin, and its bid would have resulted in a license award under a system of preferences in place for Basic Trading Area licenses. In such a case, that entity has been denied the type of opportunity to compete for an MTA license that Congress intended to exist. In addition, it will undoubtedly cost any applicant far more to aggregate 30 MHz of spectrum across an MTA (either through acquisitions or combinatorial bidding) than it would to bid on the MTA itself. Consequently, there is no reason that small business and minority-controlled applicants should be relegated to certain spectrum blocks.

5/ Under current rules, only 30 of 120 MHz in PCS is set aside for women, minorities, and small businesses. No specific protections for these underrepresented groups are proposed for any other spectrum to be auctioned.

IV. Winning Bidders Should Be Permitted To Pay Over Time.

Columbia supports numerous commenters who favor permitting winning bidders to pay the government over time.[6/] Permitting winning bidders to pay over time would facilitate participation of minority and small business entities, as sought by Congress. It would also promote the rapid introduction of new products and services by reducing the capital that must be immediately directed away from service-oriented activities in order to pay for spectrum. Finally, it reflects the reality of modern industry, where most large capital expenditures are paid over time. Capital outlays for equipment, personnel, working capital, and other operating expenses are very often paid for with debt financing.

In administering time payments, the Commission should charge a minimum interest rate, to permit applicants to plow as much capital as possible into the business of developing efficient communications services.

V. Conclusion

The vast majority of parties filing comments agree that auctions should not be used to license pending RSA applications. When balancing the mischief which would be caused by retroactive application of the rules against the potential public interest

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6/ *See, e.g.*, comments filed by *Cook Inlet Region, Inc.*, *Rochester Telephone Corporation*, *The Small Telephone Companies of Louisiana*, *Alliance of Rural Area Telephone and Cellular Service Providers*, *Quentin L. Breen*, *California Public Utilities Commission*, *CFW Communications Company, et al.*, and *Chickasaw Telephone Company*.

benefits, the Commission must conclude that pending RSA applications should be processed under the rules in existence when those applications were filed.

The Commission should use a system of preferences for all spectrum included in the auction scheme. The Commission's current proposal unfairly presupposes that small business or minority-controlled entities cannot compete for MTA licenses.

Finally, Columbia supports permitting winning bidders to pay the government over time. This will promote the rapid introduction of service and increase capital available for system development.

Respectfully submitted,

COLUMBIA CELLULAR CORPORATION

By: _____

Thomas Gutierrez
David A. LaFuria
Its Attorneys

Lukas, McGowan, Nace &
Gutierrez, Chartered
1819 H Street, N.W., 7th Floor
Washington, D.C. 20006
(202) 857-3500

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